

S.B.Civil Misc. Appeal No.1410/2004

Ramlal and another. vs. Mohammed Salim and another.

Date : 17.7.2006

HON'BLE MR. PRAKASH TATIA, J.

Mr. NK Rastogi, for the appellants.

Mr. RK Singhal) for the respondents.
Mr. BN Kalla)

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At the request of learned counsel for the parties, the matter is finally heard and decided.

Learned counsel for the appellants submits that though there are summons lying in the court file of the trial court wherein it has been shown that the summons were personally served upon the appellants/defendants no.2 and 3 but in fact, it appears from the alleged signature of the defendants no.2 and 3 that those are not the signatures of the defendants no.2 and 3 for which the learned counsel for the appellants has shown the certified copy of the summons. According to learned counsel for the appellants, alleged signatures are the names of appellants Ram Lal and Shyam Lal which is clear from the comparison of the words "Ram Lal" and "Shyam Lal" on their respective summons with the writing of the process server wherein also the names of Ram Lal and Shyam Lal are written. It appears that both the names on summons written at two places are from the same handwriting. It is also submitted that Order 5 Rule 8 CPC has not been complied with for service of the respondents.

Learned counsel for the appellants vehemently that the appellants are bonafide purchasers of the property in question and they are in possession. There would not have been any reason for them to not to contest the suit where the property involved is immovable property. It is also submitted that there may be some omission in the statement of the appellants but in totality of the fact situation, it is clear that only once efforts were made to serve the summons upon the appellants. It is also pointed out that summons were also sent by registered post but they returned back. The court below merely proceeded on the fact that the addresses mentioned in the summons are the correct addresses but at this time, ignored the fact that if mere correct addresses on the summons was so important, then there was no reason for return of the registered post by which the summons were sent for service upon the defendants. It is also submitted that the court below should have taken a liberal approach looking to the totality of the facts where the appellants have not avoided the service. The Court below should have made some more efforts for personal service of the appellants.

Learned counsel for the respondent no.1/plaintiff vehemently submitted that the summons were served upon the appellants personally. It is submitted that the appellants took the plea of one of the appellant being minor and that fact has been found to be false by the court below after appreciation of evidence. It is also submitted that after service of summons, the appellants cannot take a plea on

the ground of irregularity of service.

I have considered the submissions of learned counsel for the parties and perused the facts of the case and the reasons given by the court below.

It appears from the facts of the case that the appellants' contention is that the appellants purchased the suit property from the defendant no.1/respondent no.2 who is a lady. The respondent no.2 also did not contest the suit and the Court proceeded ex-parte against all the three persons. Admittedly, the appellants are in possession of the suit property, therefore, there is prima-facie substance in the contention of the appellants that had they any knowledge of the suit, they would have contested as no man would have lost the suit by not contesting when he has paid huge amount for purchasing the immovable property. Apart from it, the service of summons appears to be quite suspicious despite the fact that there are some omissions in the statement of the appellant but in any case, when there is no allegation of dilatory tactics upon the appellants, the Court should have taken a liberal approach.

In view of the above, this appeal deserves to be allowed, hence, allowed, the order of the trial court dated 26.11.2002 is set aside and the application of the appellants filed under Order 9 Rule 13 CPC is allowed on condition of payment of Rs.10,000/- (Rs.5,000/- by each appellant) to the plaintiff/respondent no.1 within a period

of one month from today.

Both the parties are directed to appear before the trial court on 17.8.2006. By 17.8.2006, the appellant shall also submit the written statement.

In case of non-payment of cost, the order of the court below rejecting the application filed under Order 9 Rule 13 CPC shall come into force.

S.Phophaliya

(PRAKASH TATIA), J.